1954

Blaine L. Pettingill v. Ray B. Perkins : Brief of Respondents

Utah Supreme Court

Louis E. Midgley; Attorney for Defendant and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

BLAINE L. PETTINGILL,
Plaintiff and Appellant,

— vs. —

RAY B. PERKINS,
Defendant and Respondent.

Case No.
8077

RESPONDENT'S BRIEF

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and Respondent.

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STATEMENT OF FACTS

Appellant's Statement of Facts is a prolonged resume of all the evidence produced at the trial, including irrelevant and conflicting testimony, is replete with inaccuracies and, in our opinion, tends to confuse rather than enlighten. We, therefore, prefer to make a statement of the facts.

This action was brought by the plaintiff, father of Keith W. Pettingill, age 26 months, deceased, who died as a result of an automobile-pedestrian accident on the 22nd day of July, 1952.

The scene of the tragedy was in front of the plaintiff's home at 69 North 300 East Street, Clearfield, Utah.

300 East Street runs North and South and is a hard, blacktop improved road (Tr. 13, 76) in a residential section of Clearfield, Utah (Tr. 52). The street is about 18 feet wide (Tr. 109). There are sand and dirt shoulders on both sides (Tr. 68). There are no sidewalks (Tr. 10).

The plaintiff's home is on the west side of the street and set back from the street with two lawns in front separated in the center by a walk leading from the front porch (Tr. 20). A large tree is located on each lawn (Tr. 53). To the South of the Pettingill home was a field of corn stocks and vegetable garden (Plaintiff's Exhibit "B") (Tr. 104, 105). The Pettingill home is located about one-half block North of Center Street (Tr. 69). Center Street is one of two major East-West streets leading from U. S. Highway #91 which runs North and South through the center of Clearfield, Utah (Tr. 69). In the area immediately bordering the Pettingill home, i.e. from Center Street to Third North Street, there were 21 homes abutting on 300 East Street (Tr. 109). First, Second and Third North Streets, which run West from 300 East Street, were substantially filled up with homes (Tr. 109). There was some conflict on the frequency of travel on 300 East Street, but the Plaintiff conceded that traffic was heavier on the street between 4:00 and 4:45 P.M. than at other hours (Tr. 71) and the jury was justified in finding that 300 East Street was frequently used by motor vehicles. The accident occurred at approximately 6:25 P.M. on a bright, sunny day (Tr. 5).

For approximately one hour prior to the accident,

(Tr. 11), the deceased's mother, Irene Pettingill, was seated on the South lawn (Tr. 12, 53), facing West, with her back to the street (Tr. 5, 12, 47) engaged in a jig saw puzzle with her sister, Billie Mae Harris (Tr. 44). Mrs. Pettingill was seated facing West beside the large tree which was on her left (Tr. 53).

The deceased baby had been playing near the ladies (Tr. 1) and had then walked from the West side of the street to the East side, where he sat in the sand shoulder next to the lawn seven to eight feet East of the East edge of the road (Tr. 6, 13) to play with Blaine Clark, age 4; Dennis Clark, age 6 (Tr. 6, 51); (Children of Mrs. Pettingill by a former marriage) and a neighbor child, Roland Rich, age 6. All of the children were seated in the sand except Roland Rich, who was standing beside his bicycle on the lawn (Tr. 6). When the deceased first crossed the road, Mrs. Pettingill saw him go (Tr. 44). She testified that she told Dennis, age 6, "To try and keep an eye on his brother" (Tr. 28).

After playing in the sand, the child again crossed the road from East to West back to his mother (Tr. 49), where he loved and kissed her (Tr. 49). She then saw him cross the road West to East again (Tr. 49) where he again seated himself in the sand about seven to eight feet East of the East edge of the travel portion of the road (Tr. 50). She felt the child was in a safe position (Tr. 50). About ten to fifteen minutes later (Tr. 48), while the child was again crossing from East to West, the child was struck by the defendant's Northbound car,

which at this time was traveling 10 Miles Per Hour (Jury's Answer to special interrogatory #1). Mrs. Pettingill, during the ten to fifteen minutes before the accident, did not see the child (Tr. 48), and there was evidence from which the jury could find that the child had, in that time, crossed the road, carrying sand in a bucket, from East to West, emptied the bucket and returned from West to East (Tr. 30) (Testimony of Dennis Clark).

The defendant, driving his 1935 Chevrolet automobile, had been driving East on Center Street when he inadvertently passed 300 East Street (Tr. 84, 97). He stopped, backed up and then made a left turn from the stopped position to go North on 300 East (Tr. 97). He was accompanied by his wife and baby in the front seat (Tr. 84) and his four other children in the rear seat (Tr. 84, 96). Neither the defendant nor his wife saw the deceased or the other children before the accident (Tr. 85, 101. The defendant's first knowledge of something amiss was when his rear wheels went over something (Tr. 97). He stopped without leaving skid or brake marks (Tr. 75). Neither he nor his wife heard the impact (Tr. 90, 101).

Billie Mae Harris, the only eye witness to the actual impact, looked up from her seated position and screamed just as the car struck the child. She immediately gave chase, as did Mrs. Pettingill. The child had been rolled under the car about 75 feet (Tr. 77). The car was just

stopping when Mrs. Pettingill picked the child up (Tr. 15).

There was a conflict in the evidence as to whether the child was running or walking when struck. Billie Mae Harris, one-half to three-quarters of an hour after the accident, in her own hand writing, wrote on the officer's report that the child ran into the street. (Defendant's Exhibit 1) She told the Officer at the scene that the child ran into the road, leaning forward as he ran (Tr. 77).

STATEMENT OF POINTS

The respondent respectully submits six points:

(1) The plaintiff cannot now change the theory of his case, or propose new issues not raised in the pleadings or at the trial.

(2) The negligence of the mother was the proximate cause of the accident and death of her child.

(3) The mother of the deceased child is a beneficiary of the law suit and her negligence is material and a bar to the action of the father.

(4) There was no evidence that the defendant's negligence, if any, was the proximate cause of the accident.

(5) The last clear chance doctrine is not applicable in the case at bar.

(6) The verdict of the jury and the judgment entered thereon are supported by the evidence and the law.

ARGUMENT

POINT ONE

THE PLAINTIFF CANNOT NOW CHANGE THE THEORY OF HIS CASE, OR PROPOSE NEW ISSUES NOT RAISED IN THE PLEADINGS OR AT THE TRIAL.

The plaintiff now contends, in Point Two of his Brief, that the mother's negligence was not material. This contention is in direct conflict with plaintiff's theory throughout the entire law suit, as evidenced by the following.

(a) Defendant's Answer contained the affirmative defense of contributory negligence of the mother, to which the plaintiff failed to reply.

(b) Plaintiff made no motion to attack the affirmative defense as immaterial, either in his pleadings or during the trial.

(c) Plaintiff made no objections at the time of trial to any questions on cross examination concerning the negligence of the mother.

(d) Plaintiff *requested the Court* to instruct the jury that the negligence of the mother, if any, was a bar to the action, (Plaintiff's Requested Instructions 1A and 6A), and the Court granted the requests and so instructed the jury.

(e) Plaintiff did not assign the point in his motion for a new trial.

It is submitted that the plaintiff, having adopted the point of law in question, and having tried his law suit on

that theory; and having requested the Court to so instruct the jury, cannot now be heard to complain.

See 3 Am. Juris. Sec. 253:

> "It is well settled that the theory upon which the case was tried in the Court below must be strictly adhered to on appeal."

And again at Sec. 371:

> "A party cannot for the first time on appeal object that the Court erred in submitting particular questions to the jury."

And at Sec. 379:

> "* * * exceptions must be taken to the giving or refusal of instructions or charges in order to have the question considered on review."

In *Patton v. Evans,* 69 P2 969, 92 Ut. 524, it is said:

> "But since no exception was taken to the instructions as given, and no request made for further instructions and no assignment as to any error in giving incorrect instruction was made, we cannot review such instruction on that ground."

In accord, see *Carbon County v. Draper,* 74 Utah 24, 276 P659; *Kirchgestner v. D & R G W,* Utah, 218 P2 685.

The plaintiff also contends, in Point Three of his Brief, that defendant had the last clear chance to avoid the accident.

This allegation was not made in the pleadings, there was no such contention made at the trial, and no requested instruction to the jury on this point of law was submitted by the plaintiff. It is proposed by appellant for

the first time in this appeal.

In *Shea v. Pilette,* 108 Vt. 446, 189A 154, 109 ALR 933, the Court states:

> "It is argued that the defendant had the last clear chance to avoid the accident. But, since the (Complaint) does not allege facts which gave rise to a duty in this respect, and it does not appear that the issue was made below, this theory is not for our consideration."

In *Evans v. Shand,* 74 Utah 451, 280 P. 239, the Court states at Page 240:

> "The appellant * * * asserts that the respondent is bound by the theory of his allegations and of the findings and may not now, on appeal from the judgment founded thereon, depart therefrom. We think the contention is well founded. The rule is well settled that on an appeal the parties are restricted to the theory on which the case was prosecuted or defended in the Court below. 3 C.J. 718; 2 R.C.L. 79; In re Beason's Estate, 49 Utah 24, 161 P. 678. That is especially true as to the theory accorded a pleading in the Court below which, on appeal, must be adhered to and cannot be shifted. *Certainly, on appeal, the pleadings cannot be enlarged * * * on a theory upon which the complaint was not founded nor the case tried",* etc.

It is therefore submitted, as elementary, that to permit an appellant to raise new issues in the Supreme Court would be a sanctioning of unfairness to the lower Court and the opposing party; an overruling of the orderly administration of justice; an approval of delay and ex-

pense to litigants; and an affirmance by this Court of a rule that the termination of litigation shall not be foreseeable.

The plaintiff by his actions below has waived his right to complain and is estopped now from doing so. See 3 Am. Juris., Sec. 246.

POINT TWO

THE NEGLIGENCE OF THE MOTHER WAS THE PROXIMATE CAUSE OF THE ACCIDENT AND DEATH OF HER CHILD.

The jury had overwhelming testimony from which to properly conclude that the deceased's mother was negligent. In our opinion, the Lower Court should have granted defendant's motion for a directed verdict on the ground that she was negligent as a matter of law.

It is undisputed in the testimony that the mother, shortly before the accident, knowingly permitted the baby to cross the street on *three* occasions, and that the child was struck while he was crossing the street the *fourth time.* Considering the very tender age of the child, the nature of the street and the thickly populated residential section, the mother's conduct in this regard was, in our opinion, gross negligence.

Prior to the accident, she was seated on the lawn with her back to the road, with a tree immediately to her left, and a field of high corn stalks further to her left (South), and she could not possibly have seen a car approach from the South, had she looked. And in this

position, she permitted a 26 months old child to play on the opposite side of the street from her, where she would have been helpless to protect the child had she seen him get up and start for the road. That, again, is negligence as a matter of law.

The mother was engaged in a jig saw puzzle which obviously had captured her attention, as evidenced by the fact that she neither saw nor heard the defendant's car approaching and did not know the accident had happened until her sister screamed. She was not only failing to keep a proper lookout; she was keeping no lookout at all. She was, in this respect also, guilty of negligence as a matter of law.

She attempted to justify her actions by testifying that she had instructed her six year old child to "try and keep an eye on him." Even if that be true, she was negligent in entrusting the baby's care to a child not old enough to realize or appreciate danger himself.

Mrs. Pettingill must have known, and by law is chargeable with knowing, that a 26 months old baby cannot be relied upon to remain in one place for very long; that his actions are unpredictable; that the child has no appreciation of dangerous situations and is incapable and cannot be expected to watch for vehicles on the road.

In *Barker v. Savas,* 52 Utah 262, 172 Pac. 672 (cited by Appellant) the facts are clearly distinguishable. There the six year old child was riding a tricycle *on the edge of the highway,* in a proper position thereon, and travelling

in a correct direction when struck from behind by the defendant's truck. The child in the case at bar was not playing *on* the highway, but was seated 7 to 8 feet off the edge of the highway before it jumped up and ran into the path of the defendant's car.

In *Vinnette v. Northern Pacific Ry.*, 47 Wash. 320, 91 Pac. 975, a child, six years of age, was permitted by its mother to cross some railroad tracks while she kept a lookout. However, upon the child's return, it was struck by a train and killed. The train crew never saw the child. The Court states:

> "* * * the facts are that respondent's wife, with whom he left the child, assented to her going across the tracks unattended; that the Mother watched her while leaving; that she was permitted to return alone; and that while doing so she was struck by the train before any of the switching crew saw her or knew of her presence. The acts of the parents constitute the most flagrant negligence upon their part. They must have known that the very existence of the railroad tracks was itself a sign of danger; that an unattended child, only six years of age, should not have been permitted to play upon or near them." * * * "Parents cannot delegate to trainmen or to other persons in charge of dangerous agencies the care and protection of their unattended children."

The Court also quotes with favor in the above decision as follows:

> *"To suffer a child to wander in the street has the sense of permit. If such permission of sufferance exist, it is negligence."*

POINT THREE

THE MOTHER OF THE DECEASED CHILD IS A BENEFICIARY OF THE LAW SUIT AND HER NEGLIGENCE IS MATERIAL AND A BAR TO THE ACTION OF THE FATHER.

The mother's interest in this law suit, as in all other matters pertaining to the minor children, is equal to that of the father, as clearly evidenced from the following Statutes of this State:

75-13-18, U.C.A., 1953

> "Husband and wife living together are joint guardians of their minor children, with equal powers, rights and duties with respect to the control and custody and the *services and earnings* of their minor children; and neither husband nor wife has any right paramount to that of the other with respect to the custody and control of or to the earnings of their minor children."

74-4-5 (3), U.C.A., 1953

> "* * * if the decedent leaves no issue or husband or wife, the estate must go to his father and mother in equal shares, and if either is dead, then to the other."

30-1-9, U.C.A., 1953, which provides that a minor may not marry without the consent, in writing, of the father *or* mother.

30-2-9, U.C.A., 1953

> "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and

in relation thereto they may be sued jointly or separately."

So that, in the case at bar, the mother is equally liable for the medical and funeral expenses incidental to the care and burial of the deceased.

It is therefore submitted that it would be anomalous and contrary to the obvious legislative intent, as clearly indicated by the above Statutes, to hold that the mother would have no interest in the recovery had from this law suit, had the plaintiff been successful and recovered damages.

If such were the law, a mother, under a decree of divorce or separate maintenance providing her with the custody of the child, would have no recourse whatsoever should her child be negligently killed, but the father could recover substantial damages and keep the entire proceeds for himself. This, although from a practical and humane standpoint, the mother's loss could conceivably be much greater than the father's.

The Supreme Court of this State, although we can find no decision squarely ruling on the subject, has by clear and unequivocal language, upheld the conclusion that the question of the mother's negligence is material.

In *Barker v. Savas,* 52 Utah 262, 172 Pac. 672, (Cited by Appellant), the Court, after spending considerable time reviewing the actions of the mother prior to the accident, states:

"Neither was there any negligence on the

part of the mother."

In *Hyde v. Union Pac. Ry.*, 7 Utah 356, 26 P 979, decided June 5, 1891, plaintiff (father) sued for the death of a four to five year old child who had gone to sleep on the railroad tracks and was killed by a train. The accident occurred on a clear July day, at noon. The engineer and fireman saw the child but thought it was a rag.

The Supreme Court upheld the Lower Court instruction, which, on the question of damages, was as follows in part, at Page 980:

> "* * * and takes into consideration the assistance that it (child) might be to the *parents* in future years; * * * the comfort that the *parents* might take * * * the reliance that *they* could take * * * for future years for *their* support * * * in determining what *they* should receive," etc.

The Supreme Court states at Page 981:

> "The questions of the negligence of the *parents* and of the railroad company were submitted to the jury * * * and we see no reason to disturb their verdict * * * But even if the *parents were* (negligent) we think under the circumstances of this case such negligence should not defeat a recovery."

The Court then holds that the facts constituted a situation where the last clear chance doctrine was applicable.

In *Corbett v. Oregon Short Line Railroad Co.*, 25 Utah 449, 71 P. 1065 (decided April 1, 1903), plaintiff (father) brought the action for the death of his two year

and three month old child, which was killed on a railroad track at Mammoth, Utah. At Page 1066, in discussing the lower Court's refusal to give an instruction concerning the contributory negligence of "the parents, or either of them", states at Page 1066:

> "It was not error to refuse this request for the reasons (1) There was no evidence of contributory negligence, *of the parents, or either of them,"* etc.

In *Parmley v. Pleasant Valley Coal Co.,* 64 Utah 125, 228 P 557, decided August 8, 1924, the Court upholds the obviously sound and universally held ruling that the person designated to bring the wrongful death action does so on behalf of all the heirs, in order to avoid a multiplicity of suits.

In that case, the mother of a posthumous child brought suit for the death of the father. The mother (wife) had previously filed suit and settled the suit by confession of judgment. At Page 560 the Court states:

> "Under the terms of the Statute we think no one will deny that if a personal representative brings the action all the heirs are bound. For the very same reason all are bound if one or more of the heirs bring it, *because in either event the action is prosecuted for the benefit of all the heirs.* * * *
>
> "As we have seen, that has always been the construction placed upon the Statute as originally adopted, and the legislature, in naming another person who may sue, took the precaution of again making it clear that nevertheless but one action

> can be maintained regardless of who brings the action and that such an action is for the benefit of all the heirs."

The Court also states at Page 562:

> "If damages are recovered, each heir is entitled to his proportionate share, *whether he was a party to the action or not,* and, if his share is withheld from him he may always sustain an action against his coheirs for contribution."

Appellant's counsel cites the Annotation in 2 ALR 2 785 and the Annotator's conclusion at Page 805 that the great weight of authority does not impute the negligence of one spouse to the other unless there is a true agency relationship in the facts. Counsel also recites, in POINT 2 of his Brief, that there is no agency relationship between husband and wife merely because of the marriage contract. These propositions, however, are neither applicable nor controlling in the case at bar.

The mother's negligence is material and a bar to the action in this State, not because of agency and imputed negligence but because she is a *beneficiary* of the law suit. In all respects she is a co-plaintiff, and the law will not permit a person to recover damages, either fully or partially, where those damages resulted from the contributory negligence of that person.

As clearly indicated in the 2 ALR 2 Annotation (supra), there is a wide variance in the results of the decisions from the various states on the effect of the contributory negligence of the beneficiary not a party to the law suit. This is understandable because of the divergent

types of wrongful death Statutes and, in the main, the decisions can be rationalized by examining the Statutes being interpreted by the various Courts.

If the Statute in question provides that the cause of action *survives* the injured person's death, then of course the contributory negligence of the *deceased* is the only bar to the action. In these jurisdictions, therefore, the negligence of a beneficiary is immaterial. See *Wymore v. Mahaska,* 78 Iowa 396, 43 N.W. 264; *Wilmot v. McPadden,* 78 Conn. 276, 61A. 1069; *Love v. Detroit Ry.,* 170 Mich. 1, 135 NW 963; *Nashville Lumber Co. v. Busbee,* 100 Ark. 76, 139 SW 301; 2 ALR2 at 811.

The Utah Court, in *Halling v. Ind. Acc. Comm.,* 71 Utah 112, 263 P. 78, at Page 118, states:

> "It (The Wrongful Death Statute) does not revive or continue the action of the deceased", and held that the action is a new cause of action.

See also *Morrision v. Perry,* 104 Utah 151, 140 P2 772.

So also, in community property states, some Courts hold that the mother, in caring for the child, is acting for the community and her negligence is imputed to the father under the *agency* theory.

See *Agdeppa v. Glougie,* 162 P2 944, 71 Cal. App. 2 463. *Ostheller v. Spokane and I.E.R. Co.* (1915) 107 Wash. 678, 182 P 630, 2 ALR 2 at 808.

So that if the Wrongful Death Statute is *punitive*

in nature, the contributory negligence of a beneficiary is *immaterial,* as the law seeks only to punish the wrong-doer for *his* negligence.

See *Herrell v. St. Louis F. R. Co.* (Missouri) 23 SW 2 102, 69 ALR 470; *O'Connel v. Benson Coal Co.,* 301 Mass. 145, 16 NE2 636; *Southern Railway Co. v. Skipp,* 169 Ala. 327, 53 So. 150; 2 ALR 2 at Page 811.

The Utah Court in *Morrison v. Perry* (supra) 104 Utah 151, 140 P2 772, states:

> "The law does not seek to punish the wrong doer, but simply to compensate the heirs."

And again, as in Colorado, where the Statute (Gen. Laws 1877, P 343) gave the cause of action to the *father and mother,* and the Code of the State provided that an action for death of a child might be brought by the father, or in case of his death or desertion of his family, by the mother (same as Utah) the Supreme Court in *Phillips v. Denver Tramway,* 53 Colo. 458, 128 P. 460 at Page 464, states:

> "Construing the act of 1877 and the Code provision *together,* this Court has held that such an action may be brought by the father alone *or by the father and mother,* and that while the mother was a proper party she was not a necessary one. If not joined in the action, the mother might apply to be made a party and such application should be granted for the purpose of protecting her interest * * * for, *under the Statute,* the mother has an equal interest in the judgment with the father * * *"

At Page 466:

> "Each of the parties here (under the Statute) have a half interest, and it would be an easy matter for the jury, under proper instructions and interrogatories, in case they find the father to be guilty of such contributory negligence as would defeat his recovery, to ascertain the amount that should be given to the mother * * *."

In accord, see *L.A. & S.L. Ry. v. Umbaugh,* 61 Nevada 214, 123 P2 224 (Construing the Nevada Statute, which reads):

> "The father and mother jointly, or the father or the mother without preference to either * * *" may bring the action.

And, finally, in those jurisdictions wherein the Statute gives the cause of action to the *Estate,* through a personal representative, administrator or executor, many Courts hold that the negligent beneficiary does not benefit directly from the law suit, but only indirectly through distribution of the estate and that the beneficiary's negligence is not therefore material.

See 2 ALR 2 at Page 795 (Sec. 4) and cases therein cited.

But in re. *Behm's Estate,* ..... Utah ....., 213 P2 657, this Court held that the proceeds of a Wrongful Death action are not assets of the estate and upheld the following from *Morrison v. Perry* (supra):

> "* * * the estate is separate and distinct from the plaintiff or the statutory beneficiaries in this action."

It is, therefore, understandable that the Restatement of the Law of Torts, Sec. 493, provides:

> "The effect of the contributing negligence of a beneficiary under a Death Statute *depends upon the provisions of the Statute.*"

The Utah Death Statute, 78-11-6, U. C. A., 1953, stands almost alone in comparison to the Statutes of the other jurisdictions.

The Arizona Wrongful Death Statute, Ch. 18, Sec. 945, Revised Code of Arizona, 1928, contains the same wording as the Utah Statute.

In *Flagstaff v. Gomez,* 23 Ariz. 184, 202 P 401, 23 ALR 661, a fifteen month old child fell into a street excavation and was drowned. The father, under the Statute, brought suit against the City of Flagstaff. The Lower Court refused the defendant's motion to amend its answer at the time of trial to include the defense of contributory negligence of the parent. Verdict in the Lower Court was awarded the plaintiff, and, on appeal, the Supreme Court states:

> "The reasons for the rule (a parent's negligence is not imputed to a child in a suit for injuries to the child) fail where the action, though nominally for the benefit of the estate, is in reality in the interests of the beneficiary, whose negligence contributed to the accident resulting in the death. To deny the defense of imputed negligence where this is true would be the equivalent of permitting one to profit by his own wrong."
>
> "(The parents) are the sole heirs of their fif-

teen month old child. The Appellants should have been permitted to place before the jury their defense of imputed negligence, for, if they had been allowed to do so, and could have persuaded the jury that it was the proximate cause of the child's death, they would have been entitled to a verdict in their favor."

"When the action is by the parent in his own right *or for his benefit* * * * the contributory negligence of the parent is a bar to the action *and this although the action is brought by one parent and the negligence was that of the other.*"

It is submitted, therefore, that the father and the mother must succeed or fail together in this law suit, and the contributory negligence of the mother is a bar to the action. This for the reason summarized by the Illinois Supreme Court in *Hooperton Motor Bus Company v. Hazel,* 310 Ill. 38, 141 NE 392:

"The negligence of the parents bars the action, not because it is a failure of duty to the child, not because of tender considerations of the law for conditions of infancy, not because of the imputed negligence and not because no man may profit by his own wrong, but because since common law the contributory negligence of a person suffering the damages is a complete defense to the negligence of the person causing the injury. The cause of action is statutory. *There is no separation of the damages. The finding is for a single gross amount in an inseparable cause of action and the contributory negligence of one beneficiary who may be entitled to share in the recovery is a defense to the action.*"

POINT FOUR

THERE WAS NO EVIDENCE THAT THE DEFENDANT'S NEGLIGENCE, IF ANY, WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

The plaintiff produced evidence which proved only that a tragic accident occurred and that the defendant did not see the child before or at the time of the accident. There was not one iota of evidence produced from which the jury could have properly determined that when the child moved from its seated position off the road into a position of peril, the defendant could have taken avoiding action to prevent the accident, had he seen the child so move.

It is not enough to simply prove that an accident occurred involving the defendant. It is not enough to simply prove, what is admitted by the defendant, that the defendant failed to see the child while it was seated in a position off the road and therefore not in an immediate position of peril. It must be proved, and it was incumbent on the plaintiff to prove, facts which would establish that when the child moved from its position of safety *towards a position of peril* the defendant *at that time,* as a reasonable and prudent motorist, saw, or should have seen the child so move, *and could have then stopped or taken other avoiding action* to prevent the accident.

It is submitted that without such evidence the plaintiff's case fails as the jury cannot be allowed to guess or surmise on what happened at the scene. They cannot de-

termine by guesswork what distance the car was from the child at the time it stood up and moved toward the street. Without such evidence, the jury could not possibly determine whether his failure to see the child was the proximate cause of the accident or not, and the defendant's motions for a dismissal of the action and for a directed verdict should have been granted by the lower Court.

In *Gardner v. Tuck* (Missouri) 123 SW2 158, 4 NCCA (NS) 506, the defendant admitted that he was driving 35 MPH in a 25 MPH zone at night when his car struck an eleven year old boy riding a bicycle, whom the defendant never saw before the accident, and, in fact after the accident, was not cognizant of what his car had struck. The Court states:

> "It is well settled that antecedent negligence, in this case defendant's speed before he saw or should have discovered deceased in a position of imminent peril, cuts no figure."
>
> "*The issues must be determined from the evidence tending to show the conduct of the defendant at the time and after the peril arose.*"

The defendant was travelling at a speed of 10 MPH. Had he seen the child seated 7 to 8 feet off the road, he would have been under no legal duty to stop or to otherwise alter his actions. The child was seated playing in the sand, a pastime which sometimes occupies little children for hours. He had no knowledge, like Mrs. Pettingill, that the child had previously gotten up and crossed the street. Had he seen the child so occupied, he had the right to

proceed cautiously, as he was doing. How far the car was from the child when the child moved we do not know. Obviously it was very close, as the right front fender struck the child, which then was very near the east edge of the road. But actual distance is surmise, in which no one in justice, especially the jury, can engage.

(See *Richards v. Palace Laundry,* 55 Utah 409, 186 P. 439 discussed under POINT 5, infra.)

POINT FIVE

THE LAST CLEAR CHANCE DOCTRINE IS NOT APPLICABLE IN THE CASE AT BAR.

The Utah Supreme Court has, in several decisions, adopted the wording of the Restatement of the Law of Torts, Sections 479 and 480. We, however, refer the Court to *Richards vs. Palace Laundry Co.,* 55 Utah 409, 186 Pac. 439, wherein the decision clearly explains why the doctrine is not applicable in the fact situation here. There, a bicyclist, plaintiff, fell into the path of the defendant's opposite bound truck. It was urged that the defendant driver, travelling 8 to 10 MPH, could have stopped or turned to avoid the bicyclist under the last clear chance doctrine. We quote from the opinion:

> "The driver of the auto truck thus having the legal right to presume that the plaintiff would not enroach upon the driver's side of the street did not owe the plaintiff the duty of a constant lookout, *and hence, to hold the defendant liable in this action, the plaintiff, in order to make out a case in law, is required to prove more than the*

mere fact that the auto truck could have been stopped or turned aside in the distance of 10 to 15 feet."

"If this case were one, however, where it was the duty of the driver to maintain a constant lookout, as was the case in Barker vs. Savas, (supra), we would, notwithstanding the uncertainty of plaintiff's testimony, feel constrained to hold that the question of whether the driver ought to have seen the plaintiff in time to have avoided the injury was for the jury. Under such circumstances, however, there would have been no presumption of a clear roadway in favor of the driver, as is the case here. *Where there is such a presumption, the plaintiff must prove more than merely to show that if the driver had maintained a constant lookout he could have discovered his peril in time to have avoided the accident. . . . .*

The burden to show negligence was on plaintiff . . . . Is negligence shown where nothing is made to appear except that the driver of the vehicle who was lawfully passing on the right side of the street, and that in doing so came in contact with one who had intruded onto the wrong side of the street, but had done so when the driver was still such a distance away that if he had maintained a constant lookout he could have discovered the plaintiff and have avoided the injury? Clearly not . . . . The plaintiff must prove some positive act or omission constituting negligence. . . ."

Appellant must concede that if the last clear chance doctrine applies, it must be on the constructive discovery of the peril theory, as it was admitted by defendant that he at no time actually saw the child.

In 4 Blashfield Cyclopedia of Automobile Law and Practice, Sec. 2809, Page 405, it is said:

> "As the name of the last clear chance doctrine implies, it is necessary that defendant have the last clear chance to avoid injuring plaintiff, *or the time in which,* by the exercise of reasonable care, he can by the use of the means at hand .... avoid injuring plaintiff .... The rule is that *the last clear chance must be a clear one and reasonably found to be fairly given.*"

And, in 38 Amer. Jurisp., Sec. 223, at Page 909, it is said:

> "Even where the doctrine (of last clear chance) is deemed to apply generally on the basis that the defendant was under a duty *to discover the danger* to the injured person, a recovery may be defeated upon the ground that *notwithstanding the defendant had discovered the presence of the injured person, he was not bound to realize the danger to the latter.*"
>
> See also 119 ALR 1069.

It is also submitted that the doctrine of constructive discovery under the last clear chance assumes that the plaintiff's negligence had ceased and was not continuing and concurrent with the defendant's negligence. The mother's negligenec most certainly continued up to the moment of the accident.

In POINT THREE of Appellant's Brief, counsel cites Utah cases, the facts of which clearly fall within the constructive discovery of the peril class. For example, *Palmer vs. Oregon Short Line Ry.,* 34 Utah 423, 98 Pac. 689 (child asleep on railroad tracks); *Richards vs.*

Palace Laundry Co., 55 Utah 409, 186 Pac. 439 (discussed supra); *Barker vs. Savas* (supra) (child riding tricycle *on* road); *Mingus vs. Olsson,* 114 Utah 505, 201 P. 2d 495 (Pedestrian crossing street ahead of motorist); *Leinbach vs. Pickwick Greyhound Lines,* 138 Kan. 56, 23 P. 2d 449, (Collision between two vehicles); *Graham vs. Johnson,* 109 Utah 346, 166 P. 2d 230 (Pedestrian standing in *center* of road with back to motorist); *Hyde vs. Union Pacific Ry. Co.,* 7 Utah 356, 26 P. 979 (Child asleep on R. R. tracks).

In all these cases, therefore, it is apparent that the person injured or killed *was in a position of peril,* and the law imposes on the defendant, quite properly, the duty to see the peril in his path.

But in the case at bar, as we have urged in our POINT FOUR, had the child remained seated 7 to 8 feet off the road, the defendant's car would have passed without incident, despite the fact that the defendant did not see the deceased.

In *Graham vs. Johnson,* 109 Utah 346, 166 P. 2d at Page 237, where the facts were that the injured pedestrian was standing in the center of the street with his back to the approaching motorist, the Court states:

> "But in the last clear chance doctrine the word 'clear' has significance. In a case such as this when both parties are more or less rapidly changing their positions the evidence must be clear and convincing that the party whom it is claimed could have avoided the accident had a 'clear' chance to do so."

And at Page 238:

> "Otherwise we may put the onus of one's negligence on a party not negligent. *That party's negligence only arises when it is definitely established that there was ample time and opportunity to avoid the accident which was not taken advantage of.*"

There are innumerable sidewalks adjacent to heavily travelled city streets throughout this State, within 7-8 feet of the street. We submit that a motorist, travelling 20 MPH, or twice the speed of this defendant, is under no duty to stop, or alter his speed, should he observe a child *seated* on that sidewalk. His duty to that child arises when the child *moves toward the street,* or *towards a position of peril.*

Nor is the argument of appellant at Page 23 of his Brief tenable. Appellant assumes that the *very identical moment* that the child moved from its seated position, the defendant should have jammed his brakes and stopped—a premise that is unreal and unjust and requires of the defendant foresight equal to hindsight.

It is elementary that the "reaction time" of ¾th second mentioned by appellant is the time required by the average motorist in applying his brakes, *after he has decided to stop.* The time required in perceiving the child's unexpected movement, realizing the danger of that motion and reacting to the danger (perception-judgment-reaction time) can and always does consume several seconds, while the car is moving approximately 15 feet per second. The testimony at the trial showed

that only 4 seconds elapsed while the defendant's car travelled between the rose bush and the point of impact (Tr. 125).

And further, counsel completely overlooks the testimony and demonstration to the jury concerning the blind area in front of all automobiles and particularly the defendant's vehicle, caused by the dashboard, hood and right windshield post. At Page 116 of the transcript, the expert, Mr. Taylor, testified that a driver of the defendant's vehicle, with the eye level height of Mr. Perkins, could not see the ground for 38 feet ahead. It was further demonstrated to the jury, by means of a large magnetic blackboard with cars to scale and a paper template ahead of the car, showing thereon that the child, seated, would pass out of the driver's vision when the car was a certain distance, and that the child, standing erect, would pass out of a driver's vision at a lesser distance ,these distances being designated in exact feet on the template. It is now unfortunate that the record was not better preserved. It is submitted, however, that the demonstration to the jury was very clearly made and that they were justified in finding that when the child moved from its seated position, it was then within the "blind area" and could not have been seen by the defendant; this particularly in light with the officer's testimony that, according to Mrs. Harris, the child ran in a bent forward position.

And again, appellant's counsel has ignored the facts

clearly brought out to the jury, that the accident occurred on a hot July afternoon; that the jury could reasonably believe that the children were playing in the deep shade of the Pettingill tree; that they were motionless and not active; that the jury could and did find that the deceased, under those conditions, was "camouflaged," and that it was perfectly understandable, under those conditions, why the defendant and his wife failed to see the deceased.

> "It is a matter of common knowledge, if not universal experience, that all of us frequently look in a certain direction and do not see every object within our range of vision." Palmer vs. Oregon Short Line Ry. (supra).

It is therefore submitted that the last clear chance doctrine cannot possibly apply in a fact situation, as in the case at bar, where it is clear and undisputed that the roadway itself was clear as the motorist approached; where plaintiff produced no evidence at all to show the time or distance present when the child moved towards a position of peril; where there was no evidence at all tending to show that the last clear chance was clearly and fairly given; where the negligence of the plaintiff (beneficiary) continued to the point of impact; and where the defendant's evidence clearly showed why the child was not observed before it moved and could not have been seen by any motorist driving the defendant's car under the same circumstances.

POINT SIX

THE VERDICT OF THE JURY AND THE JUDGMENT ENTERED THEREON ARE SUPPORTED BY THE EVIDENCE AND THE LAW.

The evidence adduced at the trial by both the plaintiff and the defendant was suprisingly free of conflict. The jury could hardly have arrived at a different verdict than they did, both on the grounds that the accident was unavoidable on the part of the defendant and that the mother's negligence was obviously a contributing factor to this sad and unfortunate accident.

The accident was unavoidable for the very reason that any motorist, caught under the same circumstances, would have been helpless, whether he had previously seen the child in its seated position or not. Even had the defendant been endowed with foresight and had broken the law by swinging wide to the left of the child and onto the wrong side of the road, it appears certain from the facts that the child would have come in contact with the car.

To hold the defendant negligent in this instance would require all motorists in the State of Utah, upon seeing children on a sidewalk or lawn eight feet from the road, seated or otherwise, to immediately come to a stop. To proceed, even at 10 MPH, would be at the entire and sole risk of the motorist.

The law and public policy recognizes the right of a

motorist to proceed cautiously. They recognize the need of free and cautious use of the public streets by motorists for the safe and continued movement of vehicles on the highway.

The law recognizes an unavoidable accident, which this certainly was, despite the tragic consequences to the plaintiff and his wife.

And if it be urged that the proposition of law, herein propounded by our POINT THREE, is unjust, then the very nature of the marriage contract itself is unjust. "For better or for worse" is not an empty phrase. The husband and wife succeed or fail, stand or fall together in the illnesses of their children; in the heartbreak of the death of a child, whether by illness or accident; in the fortunes or misfortunes of employment or finance; in the "good breaks" or "bad breaks" of everyday life during the marriage.

We, therefore, submit that the trial below and the verdict was fair and just, both on the evidence and the law.

Respectfully submitted,

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and Respondent.